



Walter McGrath  
General Manager

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December 1, 2001

Magalie Roman Salas  
Office of the Secretary  
Federal Communications Commission  
445 12th Street, S.W., Room TW B204  
Washington D.C. 20554

**Re: Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity, in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; CS Docket No. 01-290;**

**Comments of Braintree Electric Light Department**

Dear Ms. Salas:

Braintree Electric Light Department ("BELD") submits these comments in CS Docket No. 01-290 to support extension of Section 628(c)(2)(D) for small cable operators like BELD.

BELD supports extending the exclusive contract prohibition for the following reasons:

- **The prohibition is necessary to protect program diversity for markets served by small cable systems.** Like all small cable companies, BELD purchases the core of its satellite programming from vertically integrated programming vendors. If they were able to withhold programming from us, our customers would lose over 42% of their satellite services.
- **The prohibition is necessary to protect competition for small, facilities-based providers.** BELD competes in Braintree with AT&T, the USA's largest cable company, and Echostar/DirectTV, the USA's largest satellite companies. If AT&T and other major MSO's could withhold programming from us, our video business would likely fail and consumers in Braintree would lose the benefits of true facilities-based competition.
- **One major MSO is already denying BELD access to important regional programming.** BELD's situation provides a clear example of how a major MSO will use program access to thwart a small competitor. NECN, a regional news network partly owned by AT&T, refuses to sell its service to BELD, purportedly due to an exclusive contract with AT&T. This denies our customers important regional programming and hurts our ability to compete.

To promote program diversity and competition for small companies, the Commission should extend the prohibition on exclusive contracts.

### **Company background.**

BELD, a municipally-owned utility, has provided electric services in Braintree, Massachusetts since 1892. In 1998, BELD completed construction of an HFC network in Braintree and began to offer cable modem services. In 2000, BELD began offering video services as BELD Broadband. Presently, BELD serves about 3775 cable television customers in Braintree, a penetration of roughly 31%.

BELD Broadband offers an expanded basic service of 62 analog channels. We also offer digital cable services and cable modem services. We purchase most of our satellite programming through the National Cable Television Co-op.

### **Extension of the prohibition is necessary to protect program diversity for markets served by small cable systems.**

Like all small cable companies, one factor above all is essential to the continuing viability of our video business – access to programming at fair and reasonable prices, terms, and conditions. Extension of the prohibition on exclusive contracts will ensure that customers served by small cable systems like ours will continue to have access to diverse satellite programming. Without the protection of the prohibition, cable-affiliated programmers could withhold the core of our satellite program offerings.

To demonstrate this, we attach a current channel line-up and what that channel line-up would look like if owners of cable-affiliated programming withheld their services.<sup>1</sup> Of the 39 satellite channels offered, 16 are vertically integrated services. If we lost access to that programming, we would lose over 42% of our analog satellite services. Program diversity would obviously suffer.

We understand that MSOs want to have exclusive programming to better compete with Echostar/DirecTV. Whatever the Commission decides in that debate, it should not remove the protection of the prohibition for smaller cable companies.

### **Extension of the prohibition is necessary to promote competition for small, facilities-based providers.**

Since BELD launched its video and Internet services last year, consumers in Braintree have benefited from a choice of facilities-based providers. As we understand Section 628, its principal purpose was to do just that – foster the development of competition. As noted in the Program Access Order, in order for facilities-based competition to develop, “access to programming is an essential prerequisite.”<sup>2</sup> We also note Commissioner Powell’s recent remarks on the importance of encouraging sustainable facilities-based competition.<sup>3</sup>

For a small video provider like BELD, access to satellite programming continues to be an essential prerequisite for the viability of our video business. We are not Echostar/DirecTV. We do not have, and never will have, resources like Echostar/DirecTV to pay for exclusive programming. As far as Echostar/DirecTV are concerned, the Commission might conclude that

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<sup>1</sup> See Exhibit 1.

<sup>2</sup> Program Access Order, 8 FCC Rcd. 3359, 3384 (April, 1993).

<sup>3</sup> Press Conference, Oct. 23, 2001, “Digital Broadband Migration” Part II.

the prohibition is no longer necessary for competition. But for small providers like BELD, without access to vertically integrated programming, our video operations will not really make sense. We are glad to pay reasonable rates for that programming, but we must have access to it.

As discussed below, our experience strongly suggests that without an extension of the prohibition, we will lose access to programming affiliated with major MSOs, because we are already being denied access at this time.

**AT&T-owned New England Cable News ("NECN") refuses to sell programming to BELD because of an exclusive contract with AT&T.**

BELD has experienced firsthand how program diversity and competition will be undercut if Section 628(c)(2)(D) is not extended. We have sought access to NECN for over 18 months. Each time, NECN representatives have expressed an interest in providing the services, but said that they could not because of an exclusive contract with AT&T. Upon further investigation, we learned that NECN petitioned the Commission for exclusivity rights back in 1993, because NECN claimed it needed exclusivity to survive as a fledgling regional satellite news service.<sup>4</sup> We also learned that the exclusivity rights expired on June 1, 2001.

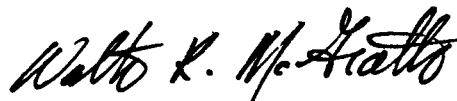
So we again asked NECN for access to their service.<sup>5</sup> NECN's response? It claimed that it went terrestrial in 1995, so it was not subject to the program access laws or the Commission's 1994 Order.<sup>6</sup> The Commission should note that this switch took place within a year of NECN and its cable owner obtaining a limited exception from the prohibition as a satellite service. Even though our customers desire regional news programming, and we are willing to pay for such a service, NECN refuses to provide it to our system.

This speaks volumes about what to expect if the Commission does not extend the prohibition. We encourage the Commission to investigate the NECN case further and determine why NECN is still denying access after the seven-year exclusivity period has expired.

**Conclusion.**

For BELD and other small cable companies, the importance of programming provided by cable-affiliated programmers cannot be overstated. Lack of access to key programming on fair and reasonable prices, terms, and conditions, will imperil the ability of systems like BELD to provide diverse programming services and to compete with large MSOs like AT&T. To avoid this result, the Commission should extend the prohibition as it applies to small cable companies like BELD.

Sincerely,



Walter R. McGrath  
General Manager

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<sup>4</sup> *In the Matter of New England Cable News*, 9 FCC Rcd. 3231 (June, 1994).

<sup>5</sup> See Exhibit 2, letter dated Nov. 7, 2001 to Art Goody, Director of Affiliate Relations, NECN, from Walter McGrath, General Manager, BELD.

<sup>6</sup> See Exhibit 3, letter dated Nov. 12, 2001, to Walter McGrath from Philip Balbom, President, NECN.

## **Exhibit 1**

## **BELD BROADBAND**

### **Current Expanded Basic Channel Line-Up**

2	WGBH	33	CNBC
3	TV Guide Channel	34	Fox News Channel
4	WBZ	35	Headline News *
5	WCVB	36	Weather Channel
6	WFXT	37	TV Land
7	WHDH	38	Travel Channel *
8	WSBK	39	E! Entertainment TV *
9	WLVI	40	Great American Country
10	WGN	41	National Network
11	WBPX	42	MTV
12	Boston Catholic	43	VH-1
13	EWTN	44	TBS *
14	C-Span	45	Lifetime
15	C-Span II	46	TNT *
16	Local Access	47	FX
17	Local Access	48	Animal Planet *
18	Local Access	49	USA Network
19	WGBX	50	Discovery Channel *
20	WMFP	51	Learning Channel *
21	WNDS	52	Cartoon Network *
22	WHUB	53	Disney Channel
23	QVC *	54	Fox Family
24	BET	55	Nickelodeon
25	Court TV *	56	Comedy Central *
26	WWDP	57	Food Network *
27	WUNI	58	Arts and Entertainment
28	BELD Information	59	American Movie Classics *
29	WENH	60	HGYV
30	MSNBC	61	FSNE
31	CNN *	62	ESPN
32	CNNfn *	63	NESN

“\*” denotes vertically integrated programming.

## **BELD BROADBAND**

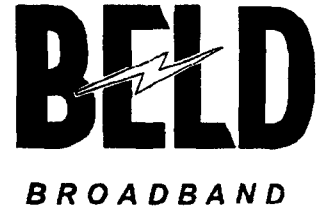
### **Expanded Basic Channel Line-Up Without Vertically Integrated Programming**

2	WGBH	33	CNBC
3	TV Guide Channel	34	Fox News Channel
4	WBZ	35	<del>Headline News</del>
5	WCVB	36	Weather Channel
6	WFXT	37	TV Land
7	WHDH	38	<del>Travel Channel</del>
8	WSBK	39	<del>E! Entertainment TV</del>
9	WLVI	40	Great American Country
10	WGN	41	National Network
11	WBPX	42	MTV
12	Boston Catholic	43	VH-1
13	EWTN	44	<del>TBS</del>
14	C-Span	45	Lifetime
15	C-Span II	46	<del>TNT</del>
16	Local Access	47	FX
17	Local Access	48	<del>Animal Planet</del>
18	Local Access	49	USA Network
19	WGBX	50	<del>Discovery Channel</del>
20	WMFP	51	<del>Learning Channel</del>
21	WNDS	52	<del>Cartoon Network</del>
22	WHUB	53	Disney Channel
23	<del>QVC</del>	54	Fox Family
24	BET	55	Nickelodeon
25	<del>Court TV</del>	56	<del>Comedy Central</del>
26	WWDP	57	<del>Food Network</del>
27	WUNI	58	Arts and Entertainment
28	BELD Information	59	<del>American Movie Classics</del>
29	WENH	60	HGYV
30	MSNBC	61	FSNE
31	<del>CNN</del>	62	ESPN
32	<del>CNNfn</del>	63	NESN

## **Exhibit 2**



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November 7, 2001

Mr. Art Goody  
Director of Affiliate Relations  
New England Cable News  
160 Wells Avenue  
Newton, MA 02459

*via Federal Express*

**Re: Braintree Electric Light Department/BELD Broadband; request for program access.**

Dear Mr. Goody:

We write in our continuing efforts to obtain access on our small cable system to New England Cable News ("NECN"). Upon further investigation, we have determined that NECN's authorization to maintain exclusive carriage contracts has expired, and it is obligated to provide its programming to our cable system under FCC program access regulations. Consequently, we request access to NECN programming in accordance with those regulations.

We explain below.

#### **Background**

Our attempts to obtain access to NECN are well documented. JoAnn Stak Bregnard first spoke with you on August 2, 2000 as BELD was putting together its channel line-up in anticipation of launching its service in Braintree. During that telephone conversation, you indicated that NECN had an exclusive contract with Cablevision (AT&T Broadband's predecessor) and that BELD would be unable to obtain access to NECN. Your follow-up email is attached.

During the last week of August 2001, Ms. Stak Bregnard again contacted you regarding carriage of NECN. We had read of Liberty Media's spin off from AT&T and inquired as to the effect of that situation on NECN's exclusive contract. You explained to Ms. Stak Bregnard that the transaction would not impact AT&T's exclusive contract with NECN, but you would check with company personnel further.

On October 16, 2001, Ms. Stak Bregnard received a voice mail from you again indicating that because of the exclusive contract with AT&T, NECN must deny BELD access to its programming.

At this point, we initiated a more in-depth investigation into NECN. The results of that investigation suggest that the continuing denial of access to NECN violates FCC program access regulations and a 1994 FCC order specifically addressing NECN.

*Your community owned electric and communications utility*



**The FCC has ordered that NECN may not maintain exclusive contracts after June 1, 2001.**

As NECN is well aware, FCC regulations prohibit exclusive programming contracts for satellite delivered programming in which a cable operator has an attributable interest. 47 CFR § 76.1002(c)(2). In 1993, NECN and its previous owner Continental Cablevision petitioned the FCC for an exemption from the prohibition on exclusive contracts. On June 1, 1994, the FCC granted that request, with the following limitations:

NECN is hereby authorized to provide exclusive distribution rights to cable affiliates within their franchise areas in the six New England states for the next eighteen months, so long as all such exclusive distribution rights terminate seven years from the release of this Order.

*In the matter of New England Cable News, Memorandum Opinion and Order, FCC RCD 3231 (1994), ¶ 53.*

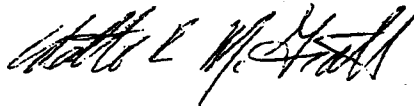
As a result of this Order, any exclusive distribution rights AT&T may have obtained from its predecessor expired as of June 1, 2001. Moreover, any NECN contract entered into after December 1, 1995 cannot contain exclusive carriage rights. Consequently, under the program access regulations, NECN is obligated to provide its programming to BELD on nondiscriminatory prices, terms and conditions. 47 CFR § 76.1002(b). If NECN has information that results in a different legal conclusion, we would welcome it.

**Request for program access.**

In light of the above, and NECN's repeated denial of program access after the expiration of its limited exclusivity period, we request access NECN programming on nondiscriminatory prices, terms and conditions. Please provide us with proposed terms of carriage within 15 days of the date of this letter.

Sincerely,

BRAINTREE ELECTRIC LIGHT DEPARTMENT



Walter R. McGrath  
General Manager

Enclosure

### **Exhibit 3**

Nov 12 01 08:21a

  
 NEW ENGLAND CABLE NEWS

November 12, 2001

Walter R. McGrath  
 General Manager  
 Braintree Electric Light Department  
 150 Potter Road  
 Braintree, MA 02184

Dear Mr. McGrath:

I am in receipt of your letter of November 7 to Arthur Goody, NECN's Vice President of Affiliate Relations.

First of all, I want to say that we greatly appreciate your interest in NECN and, legal and contractual issues aside, we would be delighted to have our network available to the television customers of the Braintree Electric Light Department. NECN is proud of the growth that has brought us to where we are today and we certainly do not wish to deny any citizen of Massachusetts or New England the opportunity to view our network.

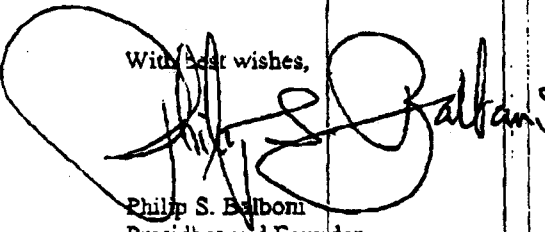
Nevertheless, as Mr. Goody explained in prior communications, NECN has a binding contract with AT&T Broadband that provides it with the exclusive right to distribute our network in the territory served by AT&T Broadband. As long as this contract is in effect, we are not able to provide our service to you or to any other company competing with AT&T Broadband in its service area. Should this situation change, we would be happy to be in touch with you again.

As to the 1994 Federal Communications Commission order that you cited in your letter, you are quite correct that NECN had obtained this waiver of the program access rules of the 1992 Cable Act so that we could grant exclusive contracts to cable providers. At that time New England Cable News was a satellite-delivered program service and was, therefore, covered under the provisions of the program access rules. In April 1995, NECN became a terrestrially delivered network. Such networks are not covered by the program access rules.

Therefore, I am informed by our legal counsel that the exclusivity provisions of the AT&T Broadband contract remain in effect. I hope that this clarifies the situation, even though I realize it is not the outcome for which you had hoped.

Please feel free to be in touch with Mr. Goody or me if we can answer any additional questions.

With best wishes,

  
 Philip S. Balboni  
 President and Founder

cc. Arthur Goody, NECN  
 Mark Prak, Brooks Pierce McLendon

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